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In the Supreme Court of the United States

OCTOBER TERM, 1982

DONALD T. REGAN, SECRETARY OF THE TREASURY, ET AL.,
APPELLANTS

v.

TAXATION WITH REPRESENTATION OF WASHINGTON

ON APPEAL FROM THE UNITED STATES COURT OF APPEALS FOR THE DISTRICT OF COLUMBIA CIRCUIT

BRIEF FOR THE APPELLANTS

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QUESTION PRESENTED

Sections 170(c) and 501(c) of the Internal Revenue Code of 1954 grant to charitable and other organizations described in Section 501(c)(3) tax-exempt status and eligibility to receive tax-deductible contributions under Section 170(c)(2) on the condition that "no substantial part of the [organization's] activities * * * is carrying on propaganda, or otherwise attempting, to influence legislation." The statute does not impose this restriction against influencing legislation on veterans' organizations that qualify for tax-exempt status under Section 501(c)(19) and for the receipt of tax-deductible contributions under Section 170(c)(3). Pursuant to these statutory directives, the Internal Revenue Service denied appellee recognition as an organization described in Sections 501(c)(3) and 170(c)(2) because a substantial part of its activities consists of attempting to influence legislation.

The question presented is whether Congress' use of different standards with respect to the degree of permissible legislative activities by veterans' organizations and other categories of tax-exempt organizations violates appellee's right to equal protection guaranteed by the Fifth Amendment.[1]

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[1] In addition to Donald T. Regan, the Secretary of the Treasury, appellants include Roscoe L. Egger, Jr., the Commissioner of Internal Revenue, and the United States.

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BRIEF FOR THE APPELLANTS

OPINIONS BELOW

The opinion of the district court (J.S. App. 1a-9a) and its order granting judgment in favor of the government (J.S. App. 10a) are unofficially reported at 43 A.F.T.R.2d (P-H) ¶ 79-419. The opinion of the court of appeals en banc (J.S. App. 11a-121a) is reported at 676 F.2d 715.

JURISDICTION

This is a civil action against the Secretary of the Treasury, the Commissioner of Internal Revenue, and the United States, brought by appellee pursuant to Section 7428 of the Internal Revenue Code of 1954 (26 U.S.C. (& Supp. IV)), for a declaratory judgment with respect to appellee's qualification for tax-exempt status under

Section 501(c)(3) of the Code. The district court's jurisdiction rested on 28 U.S.C. 1346(e). A three-judge panel of the court of appeals entered an opinion and judgment on April 14, 1981 (J.S. App. 15a). On June 11, 1981, the court of appeals granted appellee's suggestion for rehearing en banc and vacated the panel's opinion and judgment (*ibid.*). The judgment of the court of appeals en banc was filed on March 26, 1982 (J.A. 58). A notice of appeal to this Court was filed by the appellants on April 23, 1982 (J.S. App. 122a). The jurisdiction of this Court rests on 28 U.S.C. 1252, which authorizes an appeal to this Court from a final judgment of a court of the United States holding an Act of Congress unconstitutional in a civil action to which the United States or any agency or officer thereof is a party. An appeal may be taken where, as here, a federal statute is held unconstitutional as applied to particular circumstances. *United States* v. *Darusmont*, 449 U.S. 292, 293 (1981); *Fleming* v. *Rhodes*, 331 U.S. 100 (1947); see *United States* v. *Christian Echoes Ministry, Inc.*, 404 U.S. 561, 563 (1972); *United States* v. *American Friends Service Committee*, 419 U.S. 7, 9 n.4 (1974). The Court noted probable jurisdiction on October 4, 1982 (J.A. 59).

STATUTES INVOLVED

The relevant provisions of Sections 170(a), 170(c), 501(c), 2055(a), and 2522(a) of the Internal Revenue Code of 1954 (26 U.S.C. (& Supp. IV)) are set forth in J.S. 123a-144a.

STATEMENT

1. The material facts are undisputed and may be summarized as follows: Appellee is a nonprofit organization incorporated under the laws of the District of Columbia (J.A. 7, 17, 27). As set forth in its application to the Internal Revenue Service for recognition as a tax-exempt organization, appellee's purpose is to represent the general public, with regard to federal tax matters in

the courts, at administrative hearings, and before Congress (J.S. App. 1a-2a, 13a; J.A. 35-46). In its application to the IRS, appellee stated that it would seek out specialists in tax matters, help them to prepare testimony for presentation at legislative hearing, and follow up their presentations with informal contacts to ensure that their message is heard (J.A. 37).

Appellee is the product of a merger between two other nonprofit corporations under common control—Taxation With Representation Fund (TWR Fund), and Taxation With Representation (TWR) (J.S. App. 2a, 13a n.1; J.A. 20-21). All three organizations had the same executive director (J.A. 17, 19). Prior to the merger, TWR Fund, which published the journal *Tax Notes* and conducted litigation involving federal tax questions, had qualified under Section 501(c)(3) of the Internal Revenue Code of 1954 (26 U.S.C.) as a tax-exempt charitable and educational organization eligible to receive tax-deductible contributions under Section 170(c)(2) of the Code (J.S. App. 2a; J.A. 14). TWR, which engaged primarily in legislative activities, including attempts to influence legislation, had received recognition as a tax-exempt social welfare organization under Section 501(c)(4) of the Code (J.S. App. 2a-3a, 13a n.1; J.A. 19, 23-24, 53.[2]

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[2] A Section 501(c)(4) social welfare organization may engage in substantial lobbying in furtherance of its exempt purpose. Unlike a Section 501(c)(3) organization, a social welfare organization is not eligible to receive tax-deductible contributions or exemption from federal unemployment or social security taxes. See *Simon* v. *Eastern Kentucky Welfare Rights Organization*, 426 U.S. 26, 29 n.1 (1976); Treasury Regulations on Income Tax (1954 Code), 26 C.F.R. 1.501(c)(4)-1(a)(2)(ii).

Prior to the merger, the IRS had denied recognition to TWR as a Section 501(c)(3) organization because it could not meet the requirement of that provision that "no substantial part" of its activities consist of "attempting to influence legislation." Seeking to establish that it qualified as a Section 501(c)(3) organization, TWR then sued in the United States District Court for the Eastern District of Virginia for a refund of federal unemployment taxes assessed for 1973 through 1975. It alleged in that proceeding that the

During the pendency of TWR's unsuccessful prior attempt to challenge the constitutionality of the lobbying restrictions applicable to tax-exempt organizations under Section 501(c)(3) (see note 2, *supra*), appellee was formed in 1977 to absorb and carry forward the activities of TWR Fund and TWR, including TWR's lobbying activities (J.S. App. 2a, 13a-14a n.1; J.A. 16, 27, 35-45). Shortly after its incorporation, appellee applied to the Internal Revenue Service for recognition as a tax-exempt organization described in Section 501(c)(3) (J.S. App. 3a, 13a-14a; J.A. 35-45). On February 14, 1978, the Service ruled that appellee did not qualify for exemption under Section 501(c)(3) and was therefore not eligible to receive tax-deductible contributions under Section 170(c)(2) (J.A. 47-48). The sole basis for the Service's determination was appellee's refusal to comply with the express statutory requirement of Section 501(c)(3) that "no substantial part" of such organizations' activities would be "attempting[] to influence legislation". In accord with appellee's stated purpose (see J.A. 41-42),[3] the Service found that appellee's proposed activities included attempting to influence legislation, and

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lobbying limitation of Section 501(c)(3) violates its rights under the First and Fifth Amendments to the Constitution. The district court upheld the constitutionality of the statute and entered judgment for the government. *Taxation With Representation* v. *United States*, 76-2 U.S. Tax Cas. (CCH) ¶ 9693 (1976) (E.D. Va.). The court of appeals affirmed (585 F.2d 1219 (4th Cir. 1978)), and this court denied certiorari (441 U.S. 905 (1979)). The court of appeals held that TWR's right to free speech and to petition Congress were not impaired by the lobbying restrictions of Section 501(c)(3) and 170(c)(2). Further, the court rejected TWR's argument that it was denied equal protection because Sections 170(c)(3) permits veterans' organizations to lobby without restriction and still be eligible to receive tax-deductible contributions (585 F.2d at 1223-1224).

[3] In its application for tax-exempt status under Section 501(c)(3), appellee stated that it will assist in preparing testimony to be used before administrative and legislative hearings. It further stated that it "will assist skilled professionals in testifying before Congress and at administrative hearings" (J.A. 41).

that legislative advocacy might constitute a substantial part of its activities (J.S. App. 3a, 15a; J.A. 47-48). Although it appears that appellee may still qualify as a tax-exempt social welfare organization under Section 501(c)(4), that classification would not entitle appellee to receive tax-deductible contributions. See 26 U.S.C. 170(c)(2), 2055(a)(2), 2522(a)(2) (see also note 2, *supra*).

2. After exhausting its administrative remedies, appellee instituted this suit in the United States District Court for the District of Columbia under Section 7428 of the Code[4] seeking a declaratory judgment that it qualifies as an organization described in Section 501(c)(3). It raised two constitutional challenges to the lobbying restrictions of Sections 501(c)(3) and 170(c)(2). It first contended that withholding eligibility to receive tax-deductible contributions on the ground that it proposed to engage in substantial lobbying activity imposed an unconstitutional condition on the exercise of its First Amendment rights of freedom of speech and association. Second, it claimed that Congress' failure to apply the same lobbying restrictions in Section 501(c)(3) to certain other similarly situated tax exempt groups eligible to receive tax-deductible contributions, most notably veterans' organizations, denied it equal protection of the laws under the Fifth Amendment (J.A. 9-10).[5]

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[4] Section 7428 of the Code authorizes declaratory judgment actions in the Tax Court, the United States Claims Court, and the United States District Court for the District of Columbia in cases relating to the status and classification of organizations under Section 501(c)(3). The statute was enacted in response to this Court's decision in *Bob Jones University* v. *Simon*, 416 U.S. 725 (1974), holding that actions to enjoin the Commissioner's revocation of Section 501(c)(3) status were barred by the Anti-Injunction Act, 26 U.S.C. (& Supp. IV) 7421(a).

[5] Veterans' organizations are eligible for tax-exempt status and the receipt of tax-deductible contributions under Sections 501(c)(19) and 170(c)(3) of the Code. Unlike Sections 501(c)(3) and 170(c)(2), the tax provisions governing veterans' organizations contain no express restrictions as to lobbying. Prior to the enact-

The district court granted summary judgment in favor of the government (J.S. App. 1a-10a). It concluded that the tax statutes did not unconstitutionally interfere with appellee's protected speech activities. Relying on *Cammarano* v. *United States*, 358 U.S. 498 (1959), and the Fourth Circuit's decision rejecting the same claim in *Taxation With Representation* v. *United States*, 585 F.2d 1219 (1978), cert. denied, 441 U.S. 905 (1979), the district court concluded that the restriction against substantial legislative activity provided in Section 501(c)(3) did not penalize appellee for the content of its advocacy, but merely required that it conduct its legislative activities at its own, rather than at public, expense. This requirement, the court observed, served the legitimate purpose of assuring government neutrality toward the lobbying activities of charitable organizations and of preventing abuse of charitable lobbying by private interests (J.S. App. 5a-8a). Further, the court found no denial of equal protection. In its view, since the challenged tax classification neither implicated a fundamental right nor involved a suspect class, it was sufficient that the classification bore a rational relation to legitimate government objectives (*id.* at 8a-9a).

3. A divided panel of the court of appeals affirmed. Thereafter, the full court of appeals vacated the panel decision and reheard the case en banc. Upon rehearing, a divided 7-3 en banc court reversed the district court and remanded the case for further proceedings. The en banc court unanimously rejected appellee's contention that the lobbying limitation of Section 501(c)(3) violates its

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ment of Section 501(c)(19) (by Section 1, Act of Aug. 29, 1972, Pub. L. 92-418, 86 Stat. 656) veterans' organizations received exemption either as social welfare organizations (Section 501(c)(4)) or social clubs (Section 501(c)(7)). See H.R. Rep. No. 92-851, 92d Cong., 2d Sess. 2 (1972); S. Rep. No. 92-1082, 92d Cong., 2d Sess. 2 (1972). Some veterans' groups continue to receive exemption under these provisions. Veterans' groups, however, have been entitled, under Section 170(c)(3) and its predecessors, to receive tax-deductible contributions at least since 1924. See Section 214(a)(10)(D), Revenue Act of 1924, ch. 234, 43 Stat. 271.

First Amendment rights. On the authority of this Court's decision in *Cammarano* v. *United States*, *supra*, it observed that "First Amendment rights are not abridged, however, merely because the government refuses to subsidize those rights" (J.S. App. 30a). As it viewed the lobbying limitations of Section 501(c)(3), "[c]haritable organizations are simply not required to waive their First Amendment rights in order to obtain public benefits—they simply may not lobby with tax-deductible contributions" (J.S. App. 34a).

The court upheld, however, appellee's alternative contention that the lobbying limitation of Section 501(c)(3) denied it equal protection of the laws under the Fifth Amendment because those restrictions are not likewise imposed upon tax-exempt veterans' organizations under Section 501(c)(19). The court's analysis proceeded on the assumption that "a strict standard of review [is required] for situations in which the government grants tax exemptions affecting First Amendment rights on a discriminatory basis" (J.S. App. 38a). The court concluded that it had to "apply a heightened level of scrutiny to the *discriminatory* treatment of lobbying activities given by Section 501(c) to different tax-exempt groups" (*id.* at 43a; emphasis in original). In the court's view, "[t]he issue in this case therefore becomes whether the discriminatory framework of Section 501(c) serves a substantial governmental interest and whether the statute is narrowly tailored to serve that end" (*id.* at 45a). After examining the legislative history of the statute, the court concluded that no identifiable governmental interests justify the different tax treatment accorded veterans' groups and Section 501(c)(3) organizations (J.S. App. 65a-67a).[6]

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[6] Although it did not find it necessary to reach the question, the court observed that "it is possible that these discriminations could not even be upheld under a test asking whether they were 'rationally related to a legitimate governmental purpose,' for the discrimination may have been nothing more than an accidental or inadvertent result of legislative drafting" (J.S. App. 78a-79a).

Although the court held that "Section 501(c)'s disparate treatment of lobbying by particular tax-exempt groups leads to an unconstitutional violation of equal protection principles" (J.S. App. 72a), it declined to choose between striking down the lobbying restriction's application to Section 501(a)(3) organizations, or extending the restriction to Section 501(c)(19) veterans' organizations. The court stated that the former course "poses the most obvious problems" insofar as "[t]he legislative history of that limitation clearly shows a congressional determination that the public interest requires regulating the amount of tax-deductible dollars flowing to Section 501(c)(3) organizations that may be used for lobbying purposes" (J.S. App. 73a). The court acknowledged that "[e]xtending the lobbying treatment now given to veterans' organizations to all Section 501(c)(3) groups might open a Pandora's Box of woes and abuse" (*ibid.*). On the other hand, even though it believed the second course to be "the most logical and most in accordance with the judgments expressed by Congress" (*id.* at 76a), the court was reluctant to impose the lobbying restriction upon veterans' groups because none of those groups is a party to the litigation (*ibid.*). It accordingly declined to prescribe a remedy. In its view, "[e]xactly how this problem should be cured is not a matter that should be decided initially by this appellate court, especially when all directly affected parties are not before us" (*id.* at 78a).

The court therefore remanded the case to the district court "with the instruction that it cure the constitutionally invalid operation of Section 501(c) after inviting veterans' organizations to participate in framing the relief" (J.S. App. 77a). The court, however, limited the district court to choosing between two courses of action to cure the unequal treatment its found to exist—"either by restricting the tax benefits accorded veterans' organizations or by extending those benefits to Section 501(c)(3) organizations" (*id.* at 79a).

The dissenting judges would have held that it was within the power of Congress to place an anti-lobbying condition on the receipt of tax benefits by Section 501(c)(3) organizations without imposing a similar condition on veterans' organizations (J.S. App. 107a-120a). In their view, Congress was justified in subjecting Section 501(c)(3) organizations to that restriction in order to reform perceived abuses of their status (J.S. App. 95a-99a, 111a-114a). Congress was likewise justified, the dissent said, in its determination not to extend that restriction to veterans' organizations because of their fundamentally different role in society (*id.* at 110a, 114a-120a). In the dissent's view, "the important and unique public role played by veterans' groups" warranted congressional classification "as a different kind of entity deserving *tax* treatment different from that accorded the more generally described charitable organizations subject to section 501(c)(3)" (*id.* at 115a-116a; emphasis in original).

ARGUMENT

CONGRESS' DECISION TO RESTRICT THE DEGREE OF PERMISSIBLE LEGISLATIVE ACTIVITIES BY CERTAIN CATEGORIES OF ORGANIZATIONS AS A CONDITION FOR TAX-EXEMPT STATUS AND ELIGIBILITY TO RECEIVE TAX-DEDUCTIBLE CONTRIBUTIONS, AND NOT TO IMPOSE SUCH RESTRICTIONS UPON VETERANS' ORGANIZATIONS QUALIFYING FOR THESE TAX BENEFITS, DOES NOT VIOLATE THE EQUAL PROTECTION GUARANTY OF THE FIFTH AMENDMENT

INTRODUCTION AND SUMMARY

This case involves a constitutional challenge to the validity of two longstanding provisions of the Internal Revenue Code prescribing the conditions upon which various organizations can qualify for tax-exempt status and eligibility to receive tax-deductible contributions.

The judgment of the court of appeals erroneously holds unconstitutional, on grounds of equal protection, provi-

sions of the Internal Revenue Code of 1954 that express the same "sharply defined national policy" as the Treasury Regulations which this Court upheld in *Cammarano* v. *United States*, 358 U.S. 498, 508, 512-513 (1959). These provisions, which have been in continuous force for almost 50 years, deny tax-exempt status under Section 501(c)(3), and eligibility to receive tax-deductible contributions under Section 170(c)(2), to any organization, otherwise qualified as charitable, religious, scientific, or educational, where a "substantial part of the activities of * * * [such organization] is carrying on propaganda, or otherwise attempting, to influence legislation * * *." 26 U.S.C. 501(c)(3); see 26 U.S.C. 170(c)(2), 2055(a)(2), 2522(a)(2).

1. a. The statute does not impose this restriction against influencing legislation on veterans' organizations qualifying for the same federal tax benefits under Sections 170(c)(3) and 501(c)(19). Appellee is an organization formed for the purpose of attempting to influence tax legislation. As a result of its proposed legislative activities, the Internal Revenue Service denied appellee tax-exempt status under Section 501(c)(3) and eligibility to receive tax-deductible contributions under Section 170(c)(2).

The court of appeals ruled that the absence of a lobbying restriction upon tax-exempt veterans' groups under Section 501(c)(19) "leads to an unconstitutional violation of equal protection principles" (J.S. App. 72a). Faced with the choice of eliminating the lobbying restriction for all Section 501(c)(3) organizations, as appellee urges, or imposing it upon veterans' organizations which the court believed to be "the most logical" course (J.S. App. 76a), the court remanded the case to the district court to rewrite the statute under either of these alternatives, after inviting veterans' groups to participate in framing the relief.

But the court of appeals' imposition of the duties and responsibilities of a legislative committee upon a federal

district court cannot be reconciled with the separation of powers that is at the heart of our constitutional system. What is more, both alternative modes of relief envisioned by the court are seriously defective. It hardly requires elaboration that the allegedly "logical" imposition of the lobbying restrictions upon the veterans' organizations would not satisfy appellee's desire for tax-exempt status—the very object of this litigation. Cf. *Simon* v. *Eastern Kentucky Welfare Rights Organization*, 426 U.S. 26 (1976). In these circumstances, it is highly questionable whether a court can expand the scope of a lawsuit directed toward achieving specific relief and embark upon a remedial course, neither requested nor desired by appellee, that would impose restrictions upon approximately 35,000 veterans' organizations which are not parties to the litigation. See *Kirk* v. *Commissioner*, 425 F.2d 492, 495 (D.C. Cir.), cert. denied, 400 U.S. 853 (1970); *Ward* v. *Commissioner*, 608 F.2d 599, 601 (5th Cir. 1979), cert. denied, 446 U.S. 918 (1980).

Nor is the alternative remedy—the elimination of the lobbying restriction upon Section 501(c)(3) organizations—any more acceptable. As the court of appeals observed (J.S. App. 73a-74a), an extension to Section 501(c)(3) organizations of the right now given to veterans' organizations to lobby with tax-deductible contributions would invite wholesale public subvention of partisan interests in derogation of the legitimate expectations of Congress. Moreover, the decision below holding these limitations unconstitutional, and the standard of strict scrutiny applied, have no support in the decisions of this Court construing the equal protection guarantees of the Fifth and Fourteenth Amendments. This Court has made it clear that legislatures possess the widest latitude to draw distinctions which, in their judgment, establish a reasonable system of taxation, and that a classification rationally related to the achievement of a legitimate government objective will not be set aside unless it is palpably arbitrary or directly infringes a fundamental right.

United States v. *Maryland Savings-Share Insurance Corp.*, 400 U.S. 4 (1970); *San Antonio Independent School District* v. *Rodriguez*, 411 U.S. 1, 17, 40-41 (1973).

There is no invidious discrimination in this case, nor does the lobbying limitation infringe any right protected by the Constitution. That is the teaching of *Cammarano* v. *United States*, *supra*. There, this Court unanimously rejected the claim that a denial of income tax deductions to businesses for sums expended to influence legislation presented a substantial constitutional question under the First Amendment. As the Court there explained, "[p]etitioners are not being denied a tax deduction because they engage in constitutionally protected activities, but are simply being required to pay for those activities entirely out of their own pockets, as everyone else engaging in similar activities is required to do under the provisions of the Internal Revenue Code." 358 U.S. at 513. On the authority of *Cammarano*, the lower courts have ruled uniformly that the lobbying limitations of Sections 501(c)(3) and 170(c)(2) impair no right to speech protected by the First Amendment. See *Taxation With Representation* v. *United States*, 585 F.2d 1219, 1223-1224 (4th Cir. 1978), cert. denied, 441 U.S. 905 (1979).

b. Acknowledging the force of this precedent, the court below ruled that the lobbying limitations do not abridge appellee's First Amendment rights. The court held, however, that the lobbying limitations violate appellee's Fifth Amendment right to equal protection because they are not imposed on other organizations—most notably veterans' organizations—that qualify for tax-exempt status and eligibility for tax-deductible contributions under Sections 501(c) and 170(c)(3). While these other organizations include cemetery companies operated for the benefit of their members, as well as veterans' organizations, appellee's equal protection claim and the decision below focuses upon the tax benefits accorded vet-

erans' organizations under Sections 170(c)(3) and 501(c)(19).

But the court of appeals' conclusion conflicts with its own recognition that this case does not involve a governmental restriction of First Amendment rights, but only "unequal levels of government subsidy" (J.S. App. 39a). Indeed, the decisions of this Court recognize this very distinction. As the Court stated in *Maher* v. *Roe*, 432 U.S. 464, 475 (1977) (footnote omitted), "[t]here is a basic difference between direct state interference with a protected activity and state encouragement of an alternative activity consonant with legislative policy." Accord, *Harris* v. *McCrae*, 448 U.S. 297, 315-318, 321-322 (1980); see *Buckley* v. *Valeo*, 424 U.S. 1, 93-108 (1976). Just as this Court held in *Buckley* that Congress could grant public funding only to Presidential candidates of major parties without triggering exacting scrutiny of its determination, Congress likewise has broad authority here to further the interests of veterans by permitting their organizations to lobby on matters of importance to them with tax-deductible funds that are not available on identical terms to all other categories of exempt organizations.

c. None of the cases relied on by the court of appeals supports its conclusion that the conditions imposed by the government on the granting of a tax exemption to appellee must have more than a rational basis. In *Speiser* v. *Randall*, 357 U.S. 513 (1958), the vice of the loyalty oath struck down by this Court as violative of procedural due process was that it chilled permissible speech by requiring that applicants for California's property tax exemption come forward with evidence that they had not engaged in criminal speech. The lobbying limitation imposed on appellee bears no resemblance to that loyalty oath. It does not require appellee to assume the burden of proving an absence of criminal speech. It is "plainly not 'aimed at the suppression of dangerous ideas'" (*Cammarano* v. *United States*, *supra*, 358 U.S. at 513, quoting *Speiser* v. *Randall*, *supra*, 357 U.S. at 519). Thus, it is not subject, as was the loyalty oath in *Speiser*, to the

strict scrutiny applicable to provisions that abridge a fundamental right.

2. Accordingly, the proper inquiry in this case is whether the challenged classifications of Sections 501(c) and 170(c) bear a rational relation to the objectives of the exempt organization provisions. Those statutes meet this constitutional standard.

This Court many times has sustained distinctions in laws that address "'the phase of the problem which seems most acute to the legislative mind.'" *Buckley* v. *Valeo*, 424 U.S. 1, 105 (1976), quoting *Williamson* v. *Lee Optical Co.*, 348 U.S. 483, 489 (1955); see *Katzenbach* v. *Morgan*, 384 U.S. 641, 657 (1966). As its terms and history show, the lobbying limitation is precisely such a remedial measure. It addresses what Congress has perceived to be a serious abuse of the exempt organization provisions—the use of tax-exempt and tax-deductible funds by Section 501(c)(3) organizations "to advance the personal interests of the giver" (78 Cong. Rec. 5861 (1934)). During the floor debate preceding its enactment, the view was expressed that the same limitation should apply to all organizations otherwise eligible to receive tax-deductible contributions, including "war organizations" (*ibid.*). But Congress enacted, and has since maintained in continuous effect, a limitation applicable by its terms only to organizations classified as charitable, and not to veterans' organizations.

Furthermore, "the unique and compelling societal and governmental goals served by * * * [veterans'] organizations provide ample justification for the special tax treatment extended to them by the Congress." *Taxation With Representation* v. *United States*, *supra*, 585 F.2d at 1224. The nation owes to veterans a special debt for enduring the hazards of war and disruption of civilian pursuits associated with service in the Armed Forces. The legislative authority to provide benefits and preferences for veterans has been sustained repeatedly against constitutional attack. See *Johnson* v. *Robison*, 415 U.S. 361, 374-386 (1974). Nothing in the equal protection guaranty

requires that charitable organizations be placed on a par with veterans' organizations under the Internal Revenue Code. Equal protection does not require that "things which are different in fact * * * be treated in law as though they were the same." *Tigner* v. *Texas*, 310 U.S. 141, 147 (1940). In the exercise of its broad power to draw distinctions in the area of taxation, Congress has ample authority to recognize the debt owed veterans by allowing their organizations to conduct substantial lobbying with tax-deductible funds in furtherance of their exempt purpose. The Fifth Amendment does not demand the same subvention to all other tax-exempt groups that engage in substantial partisan activities.

A. Congress' Use Of Different Standards With Respect To The Degree Of Permissible Legislative Activities By Veterans' Organizations And Other Categories Of Tax-Exempt Organizations Is Not Subject To Strict Judicial Scrutiny But Must Be Upheld If Supported By A Rational Basis

1. *Congress has broad discretion to draw distinctions in framing revenue statutes which in its judgment produce a reasonable system of taxation*

a. Federal tax exemptions for religious, charitable or educational organizations have their roots in the Income Tax Act of 1894 (Section 32, Act of Aug. 27, 1894, ch. 349, 28 Stat. 556) and a provision for exemption was included in the Income Tax Act of 1913 (Section II(G)(a), Act of Oct. 3, 1913, ch. 16, 38 Stat. 172). A tax deduction for contributions to charitable organizations was first authorized in the War Revenue Act of 1917, ch. 63, Section 1201(2), 40 Stat. 330. American Legion posts were specifically accorded status as eligible donees of tax-deductible contributions in 1921 (Section 214(a)(11), Revenue Act of 1921, ch. 136, 42 Stat. 241); this status was extended to veterans' organizations generally in 1924 (Section 214(a)(10), Revenue Act of 1924, ch. 234, 43 Stat. 271). As early as 1921, veterans' organizations were recognized as tax-exempt social welfare organizations (Revenue Act of 1921, Section 231(8) (42 Stat. 253)).

Prior to 1934, the revenue laws contained no express limitations on the lobbying activities of exempt organizations. In 1934, Congress amended the revenue laws for the express purpose of denying tax-exempt status and deductibility of contributions to corporations, otherwise qualified as "religious, charitable * * * or educational," which engage in substantial activities to promote or defeat legislation. Revenue Act of 1934, ch. 277, Sections 23(o)(2) and 101(6), 48 Stat. 690 and 700. The following year, when Congress further amended the law to permit corporations to deduct certain contributions not qualifying as "ordinary and necessary" business expenses, an identical limitation was imposed. Revenue Act of 1935, ch. 829, Section 102(c), 49 Stat. 1016. These limitations have remained in continuous force for almost 50 years. Carried forward unchanged into the Internal Revenue Code of 1939, and now contained in Sections 501(c)(3) and 170(c)(2) of the Internal Revenue Code of 1954, they provide that any organization otherwise described in Section 501(c)(3) shall be ineligible for exemption under that provision, and ineligible to receive tax-deductible contributions under Section 170(c)(2), where a "substantial part of the activities of * * * [such organization] is carrying on propaganda, or otherwise attempting, to influence legislation * * *."[7]

When Congress amended the tax statutes in 1934 to impose the lobbying limitation, it did not make that

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[7] Section 170(c)(2) governs the deductibility for income tax purposes of contributions to charitable organzations described in Section 501(c)(3). It derives from Section 23(o)(2) of the Revenue Act of 1934, enacted to deny income tax deductions for gifts to "certain organizations which are receiving contributions in order to influence legislation and carry on propaganda" (78 Cong. Rec. 5959 (1934)). Cognate provisions added in 1934 "to carry out the policy adopted in section 23(o)(2)" (S. Rep. No. 558, 73d Cong., 2d Sess. 46, 52 (1934)), and carried forward into Sections 2055(a)(2) and 2522(a)(2) and (b)(2) of the 1954 Code, deny deductions for estate and gift tax purposes for gifts to organizations "disqualified for tax exemption under section 501(c)(3) by reason of attempting to influence legislation * * *." See Revenue Act of 1934, ch. 277, Sections 406 and 517, 48 Stat. 755 and 760.

limitation applicable to all tax-exempt organizations. On the contrary, the limitation was made applicable solely to the religious, charitable, and educational organizations exempt from tax under Section 101(6) of the Revenue Act of 1934 and eligible to receive tax-deductible contributions under Section 23(o)(2). Thus, at the very inception of the lobbying limitation, it was not imposed upon veterans' organizations exempt from tax under Section 101(8) of that Act (48 Stat. 700), and eligible to receive tax-deductible contributions under Section 23(o)(4). And this exemption of veterans' organizations from the lobbying limitation applicable to charitable organizations has remained continuously in effect.

b. Contrary to the court of appeals' determination, the classifications drawn by Congress with respect to the imposition of the lobbying limitation are not subject to strict judicial scrutiny. This Court's decisions long have recognized the broadest authority in Congress "to select some and omit other possible subjects of taxation" (*Flint* v. *Stone Tracy Co.*, 220 U.S. 107, 158 (1911)), and to "singl[e] out * * * one particular class for taxation or exemption" (*Carmichael* v. *Southern Coal & Coke Co.*, 301 U.S. 495, 509 (1937)). Its decisions establish that a legislature has broad latitude to draw lines which, in the legislature's judgment, produce a reasonable system of taxation, and that they will not be set aside if any rational basis for them is demonstrated to or perceived by the courts. For example, the Court has upheld the constitutionality of "grandfather clauses" in federal tax statutes (*United States* v. *Maryland Savings-Share Insurance Corp.*, 400 U.S. 4, 6-7 (1970)) (construing Section 501(c)(14) of the Internal Revenue Code of 1954); state tax distinctions between in-state and out-of-state bank deposits (*Madden* v. *Kentucky*, 309 U.S. 83, 87-88 1940)); and state tax distinctions between corporations and individuals (*Lehnhausen* v. *Lake Shore Auto Parts Co.*, 410 U.S. 356, 359 (1973)); state tax exclusions for businesses employing less than a prescribed number of persons (*Carmichael* v. *Southern Coal & Coke Co.*, *supra*,

301 U.S. at 509). See also *San Antonio Independent School District* v. *Rodriguez*, 411 U.S. 1, 17, 40-41 (1973); *United States Railroad Retirement Board* v. *Fritz*, 449 U.S. 166, 179 (1980).

The distinctions drawn by Congress in framing revenue statutes affect the rights of many individuals and organizations, but it does not follow that a tax otherwise within the area of congressional power is to be subjected to strict scrutiny merely because it has an indirect impact upon the exercise of a constitutionally recognized right. See *Ensminger* v. *Commissioner*, 610 F.2d 189, 192-194 (4th Cir. 1979); *Kellems* v. *Commissioner*, 58 T.C. 556, 558-560 (1972), aff'd per curiam, 474 F.2d 1399 (2d Cir.), cert. denied, 414 U.S. 831 (1973). As the district court here recognized (J.S. App. 9a), in the absence of an explicit demonstration that a tax classification is a "hostile and oppressive discrimination" (*Madden* v. *Kentucky*, 309 U.S. 83, 87-88 (1940)), or a "calculated device in the guise of a tax" (*Grosjean* v. *American Press Co.*, 297 U.S. 233, 250 (1936)), or that it otherwise infringes directly a fundamental right protected by the Constitution, this Court has held that all that the Equal Protection Clause requires is that the taxing statute bear a rational relation to the accomplishment of a legitimate government purpose. Thus, a statute that does not impinge upon a fundamental right or operate to the disadvantage of a suspect class merely must "be examined to determine whether it rationally furthers some legitimate, articulated state purpose and therefore does not constitute an invidious discrimination." *San Antonio Independent School District* v. *Rodriguez*, *supra*, 411 U.S. at 17. Accord: *Lehnhausen* v. *Lake Shore Auto Parts Co.*, 410 U.S. 356, 359 (1973); *Kahn* v. *Shevin*, 416 U.S. 351, 355-356 (1974); *Western & Southern Life Insurance Co.* v. *Board of Equalization*, 451 U.S. 648, 656-658, 666-668 (1981); see *Maher* v. *Roe*, 432 U.S. 464, 470 (1977); *Harris* v. *McCrae*, 448 U.S. 297, 322 (1980).

2. *The distinction in the tax-exempt provisions between charitable and other organizations (Section 501(c)(3)) and veterans' organizations (Section 501(c)(19)) is not invidious and does not abridge any of appellee's rights under the Constitution*

a. There is no invidious discrimination in this case, nor does the lobbying limitation infringe any of appellee's rights under the Constitution. This is the teaching of *Cammarano* v. *United States*, 358 U.S. 498 (1959). There, this Court unanimously sustained longstanding Treasury Regulations which expressed, as the Court twice observed (358 U.S. at 508, 512), the same "sharply defined policy" as the limitations on lobbying contained in Sections 501(c)(3) and 170(c)(2) of the Internal Revenue Code of 1954.[8] The Court ruled in *Cammarano*

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[8] The regulation in question denied a deduction for business expenses, otherwise qualifying as "ordinary and necessary," if incurred for "lobbying purposes, the promotion or defeat of legislation, the exploitation of propaganda * * *." Promulgated as Art. 143, Treas. Reg. § 33 (1918), it appeared continuously thereafter, without substantial change, until the enactment of Section 162(e) of the 1954 Code, by Section 3(a), Revenue Act of 1962, Pub. L. No. 87-834, 76 Stat. 973. Section 162(e) permits a taxpayer to deduct, as "ordinary and necessary," certain business expenses incurred "in direct connection with" legislative matters "of direct interest to the taxpayer * * *." The amendment confirms that expenses "to influence the general public * * * with respect to legislative matters" are not deductible as trade or business expenses.

This Court earlier sustained the same regulation as consistent with congressional and judicial policy. *Textile Mills Securities Corp.* v. *Commissioner*, 314 U.S. 326, 336-339 (1941). It there noted that the Revenue Act of 1936, ch. 690, Section 23(q), 49 Stat. 1661, specifically provided for the deduction of certain contributions by corporations to specified donees " 'no substantial part of the activities of which is carrying on propaganda, or otherwise attempting, to influence legislation' " (314 U.S. at 338 n.18). "The general policy being clear", it concluded, "it is not for us to say that the line was too strictly drawn" (314 U.S. at 339). See *Cammarano* v. *United States*, *supra*, 358 U.S. at 503-504, 508; *Commissioner* v. *Sullivan*, 356 U.S. 27, 28 (1958); *Tank Truck Rentals, Inc.* v. *Commisioner*, 356 U.S. 30, 33-34 (1958).

that the regulation, "adopted by the Commissioner in the early days of federal income tax legislation, in continuous existence since that time, and consistently construed by the courts on many occasions to deny deductions," had acquired the force of law (358 U.S. at 510-511). Moreover, it rejected the argument that enforcement of the regulation to deny deductions for sums expended to influence legislation presented a substantial constitutional issue under the First Amendment. As the Court explained, "[p]etitioners are not being denied a tax deduction because they engage in constitutionally protected activities, but are simply being required to pay for those activities entirely out of their own pockets, as everyone else engaging in similar activities is required to do under the provisions of the Internal Revenue Code." 358 U.S. at 513.

On the authority of *Cammarano*, the lower courts have ruled uniformly that the lobbying limitations of Sections 501(c)(3) and 170(c)(2) impair no right protected by the First Amendment. *Taxation With Representation* v. *United States*, 585 F.2d 1219, 1223-1224 (4th Cir. 1978), cert. denied, 441 U.S. 905 (1979); *Christian Echoes National Ministry, Inc.* v. *United States*, 470 F.2d 849, 856-857 (10th Cir. 1972), cert. denied, 414 U.S. 864 (1973); *Haswell* v. *United States*, 500 F.2d 1133, 1147-1149 (Ct. Cl. 1974), cert. denied, 419 U.S. 1107 (1975); see *"Americans United" Inc.* v. *Walters*, 477 F.2d 1169, 1181-1182 (D.C. Cir. 1973), rev'd on jurisdictional grounds, 416 U.S. 752 (1974).

b. The court of appeals below acknowledged the force of this precedent. As it observed, "First Amendment rights are not abridged * * * merely because the government refuses to subsidize those rights" (J.S. App. 30a; see *id.* at 34a-35a). See *Cammarano* v. *United States*, *supra*, 358 U.S. at 515 (Douglas, J., concurring). It found that "charitable organizations are governed by no conditions other than those upheld in *Cammarano*" (J.S. App. 35a). The court concluded, however, that "this case is not like *Cammarano*, in which the indirect burdens on First Amendment expression fell equally on

all. Only a heightened scrutiny test fully accords with decisions in other cases" (J.S. App. 40a).

But that conclusion conflicts with the court of appeals' own recognition that this case does not involve any governmental restriction of First Amendment rights, but only "unequal levels of government subsidy" (J.S. App. 39a). Indeed, the decision of this Court construing the equal protection guarantees recognize this very distinction. As this Court observed in *Maher* v. *Roe*, 432 U.S. 464, 475-476 (1977) (footnote omitted):

> There is a basic difference between direct state interference with a protected activity and state encouragement of an alternative activity consonant with legislative policy. Constitutional concerns are greatest when the State attempts to impose its will by force of law; the State's power to encourage actions deemed to be in the public interest is necessarily far broader.

At issue in *Maher* was a Connecticut welfare regulation under which Medicaid recipients received payments for abortions certified as medically necessary and for other medical services incident to pregnancy and childbirth, but not for nontherapeutic abortions. The district court held that the regulation violated the equal protection clause of the Fourteenth Amendment because the unequal subsidization impinged on the right to abortion recognized in *Roe* v. *Wade*, 410 U.S. 113 (1973). But this Court ruled that the regulation did not infringe that right and sustained the regulation as a rational means to a legitimate government purpose (432 U.S. at 470-471, 473-480). As the Court pointed out, "[t]he State * * * has imposed no restriction on access to abortions that was not already there. The indigency that may make it difficult—and in some cases, perhaps impossible—for some women to have abortions is neither created nor in any way affected by the Connecticut regulation" (*id.* at 474). Thus, the Court concluded that even though the Connecticut regulation made childbirth a more attractive

alternative by determining to fund only therapeutic abortions, the regulation was valid because it imposed no governmental restriction on access to abortions.[9] Accord, *Harris* v. *McCrae*, 448 U.S. 297, 315-318, 321-322 (1980).

The Court drew the same distinction in *Buckley* v. *Valeo*, 424 U.S. 1, 93-108 (1976). There, the Court upheld as consistent with the guarantees of free speech and equal protection, certain provisions of the Federal Election Campaign Act of 1971, 2 U.S.C. 431 *et seq.* Those provisions grant public funds, through Subtitle H of the Internal Revenue Code of 1954, and by other means, to Presidential candidates of major, but not of minor, parties. The Court found that they were designed to further, not abridge, First Amendment values and to curb the improper influence of private contributions on elections (424 U.S. at 92-93 & n.127, 96). The Court rejected an analogy to cases in which it had subjected to "exacting scrutiny" laws that placed "direct burdens * * * on a candidate's access" to a ballot. *Id.* at 93-94. In terms applicable with equal force to appellee's claim that it is "prevented from speaking out freely" (J.A. 25), the Court stated (424 U.S. at 94-95) (footnote omitted):

> In contrast, the denial of public financing to some Presidential candidates is not restrictive of voters' rights and less restrictive of candidates'. Subtitle H [of the Internal Revenue Code of 1954] does not prevent any candidate from getting on the ballot or any

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[9] The Court amplified this point in reaching a similar conclusion in *Harris* v. *McCrae*, 448 U.S. 297, 316 (1980). It there stated:

> [I]t simply does not follow that a woman's freedom of choice carries with it a constitutional entitlement to the financial resources to avail herself of the full range of protected choices. The reason why was explained in *Maher*: although government may not place obstacles in the path of a woman's exercise of her freedom of choice, it need not remove those not of its own creation.

voter from casting a vote for the candidate of his choice; the inability, if any, of minor-party candidates to wage effective campaigns will derive not from lack of public funding but from their inability to raise private contributions.

The foregoing decisions in *Buckley*, *Harris*, *Maher* and *Cammarano* establish the mode of constitutional analysis appropriate to this case.[10] Just as Congress could de-

[10] Appellee argued below that *Cammarano* is distinguishable because it upheld the denial of deductibility only for funds used specifically for lobbying whereas the lobbying limitations of Sections 501(c)(3) and 170(c)(2) disqualify appellee from holding charitable tax status and from receiving any tax-deductible contributions (J.S. App. 74a n.52). Cf. *Harris* v. *McCrae*, *supra*, 448 U.S. at 317 n.19; *Maher* v. *Roe*, *supra*, 432 U.S. at 474-475 n.8; *Cammarano* v. *United States*, *supra*, 358 U.S. at 515 (Douglas, J., concurring).

But these limitations are no broader than necessary to accomplish the underlying congressional purpose and do not "penalize" appellee for the content of its advocacy. Cf. 26 U.S.C. 501(h) and note 20, *infra*. As the Court pointed out in *Cammarano*, the lobbying limitations now embodied in Sections 501(c)(3) and 170(c)(2) "made explicit the conclusion * * * that 'political agitation as such is outside the statute, however, innocent the aim * * *.'" 358 U.S. at 512, quoting *Slee* v. *Commissioner*, 42 F.2d 184, 185 (2d Cir. 1930). The limitations on substantial lobbying correctly implement both that "sharply defined policy" (*ibid.*), and the settled principle that the presence of a single nonexempt purpose, if substantial in nature, suffices to disqualify an organization from holding charitable tax status. *Better Business Bureau* v. *United States*, 326 U.S. 279, 283 (1945); Treasury Regulations on Income Tax (1954 Code), 26 C.F.R. 1.501(c)(3)-1(c).

Indeed, an analogous limitation appears in the Federal Regulation of Lobbying Act, ch. 753, 60 Stat. 839, 2 U.S.C. 261 *et seq.*, which this Court upheld against a First Amendment challenge in *United States* v. *Harriss*, 347 U.S. 612 (1954). That Act covers contributions made or solicited for "the principal purpose" of influencing the passage or defeat of congressional legislation. This Court construed the Act to cover any contribution "which in substantial part is to be used to influence legislation" (*id.* at 622). Citing the predecessor of Section 170(c)(2) of the 1954 Code, it noted that "[s]uch a criterion is not novel in federal law." 347 U.S. at 622 n.13. As the Court explained, "[i]f it were otherwise—if an organization, for example, were exempted [from coverage under the Act] because

termine to grant public funding to a particular class of candidates without triggering strict and exacting scrutiny of its determination, surely Congress has at least as much, and possibly more, authority to permit veterans' organizations to lobby on matters of importance to them with tax-deductible funds that are not available on identical terms to all other types of exempt organizations. See *Haswell* v. *United States*, *supra*, 500 F.2d at 1150. The benefits thus granted to certain organizations and withheld from others are a matter of legislative grace, not of constitutional entitlement. The unquestioned right to free speech and petition and to equal protection does not carry with it a guarantee of any person's, or any corporation's, qualification for tax-exempt status. See *Commissioner* v. *Sullivan*, 356 U.S. 27, 28 (1958); *Harris* v. *McCrae*, *supra*, 448 U.S. at 316-317 & n.19; *Cammarano* v. *United States*, *supra*, 358 U.S. at 515 (Douglas, J., concurring). Thus, the question in this case is not whether Congress has denied or infringed a fundamental right to lobby but rather whether Congress violated the Constitution by not extending to charitable organizations the same treatment extended to veterans' organizations. Here, as in *Buckley*, *Harris*, *Maher*, and *Cammarano*, Congress need only show that its decision to encourage a particular activity or interest is a rational means to a legitimate governmental end.

c. *Speiser* v. *Randall*, 357 U.S. 513 (1958), upon which the court of appeals principally relied (J.S. App. 36a-39a), is inapposite. Unlike the loyalty oath that was a condition of property tax exemption in *Speiser*, Section 501(c)(3) is "plainly not 'aimed at the suppression of dangerous ideas.'" *Cammarano* v. *United States*, *supra*, 358 U.S. at 513, quoting *Speiser* v. *Randall*, *supra*, 357 U.S. at 519. Although the court of appeals recognized that *Speiser* could be read as turning on that distinction,

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lobbying was only one of its main activities—the Act would in large measure be reduced to a mere exhortation against abuse of the legislative process." *Id.* at 622-623.

it believed that such an "interpretation conflicts with the approach taken by the Court" (J.S. App. 36a-37a n.24). It accordingly concluded that this case could be assimilated to the situation in *Speiser*, and that *Cammarano* and *Speiser* together "requir[e] a strict standard of review for situations in which the government grants tax exemptions affecting First Amendment rights on a discriminatory basis" (J.S. App. 36a-40a).

But the reading of *Speiser* rejected by the court below was precisely the one adopted by the unanimous Court in *Cammarano*. There, this Court distinguished *Speiser* as involving a statute "'aimed at the suppression of dangerous ideas.'" 358 U.S. at 513, quoting 357 U.S. at 519.[11] *Speiser* has no more relevance here. Neither it nor *Cammarano* authorizes, much less requires, the strict scrutiny standard of review employed by the court of appeals.

What is more, the court's view that *Speiser* turned on "discriminatory" treatment of separate categories of tax-

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[11] The government argued to this Court in *Cammarano* (Br. for the Resp. at 40-41 (No. 29, 1958 Term); emphasis added):

> Only recently this Court pointed out (*Commissioner* v. *Sullivan*, 356 U.S. 27, 28) that "Deductions are a matter of grace and Congress can, of course, disallow them as it chooses." This statement, no doubt, is subject to the qualification that a grossly unreasonable classification of deductions will exceed constitutional limitations, particularly if the classification is "aimed at the suppression of dangerous ideas." See *Speiser* v. *Randall*, 357 U.S. 513, 519. But that clearly is not this case. *The regulation treats all legislation alike, regardless of the political party or pressure group; it does not single out any particular kind of legislation as good or bad, innocuous or dangerous, orthodox or radical.* Indeed, it is taxpayers themselves who would have the taxing authorities make a qualitative evaluation of different types of speech; they argue that the regulation does not apply to expenditures which are "completely free of taint from law or morals" (Br. 20, No. 50) or are "open, aboveboard, legitimate" (Br. 32, No. 29), and even contend that the regulation is unconstitutional if otherwise construed (Br. 18, 20 No. 50).

payers (J.S. App. 38a-39a) finds no support in this Court's opinion in that case. *Speiser* involved an amendment to California's constitution that required each applicant for exemption from California's property tax to swear, as a condition of the exemption, that he did not "'advocate the overthrow of the Government * * * by force or violence or other unlawful means'" (357 U.S. at 515). As construed by the Supreme Court of California, that amendment operated to deny an exemption only to an applicant who engaged in speech that might be criminally punished (*id.* at 519). Thus, as this Court viewed the matter, the vice of the oath was that it chilled permissible speech by requiring that an applicant seeking exemption come forth with evidence that he had not engaged in criminal speech. *Id.* at 526. As the Court explained, "[t]he man who knows that he must bring forth proof and persuade another of the lawfulness of his conduct necessarily must steer far wider of the unlawful zone than if the State must bear these burdens" (*ibid.*). The Court therefore struck down the oath as violative of the procedural safeguards of the due process clause of the Fourteenth Amendment (357 U.S. at 517, 520-521, 523, 526-529).[12]

Thus, the lobbying limitation imposed on appellee bears no resemblance to the loyalty oath requirement struck down in *Speiser*. Sections 501(c)(3) and 170(c)(2) do not infringe protected activity. They do not require appellee to assume the burden of proving an absence of criminal speech. And as this Court subsequently confirmed, they are "plainly not 'aimed at the suppression of dangerous ideas.'" *Cammarano* v. *United States*, *supra*, 358 U.S. at 513, quoting *Speiser* v. *Randall*, *supra*,

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[12] Indeed, the Court pointed out that its disposition of that case on grounds of procedural due process made it unnecessary to consider whether, as claimed, equal protection was denied to those seeking property tax exemption because the loyalty oath was "required only as to property-tax and corporation-income-tax exemptions, but not as to the householder's personal-income-tax" (357 U.S. at 517-518 n.3).

357 U.S. at 519. Instead, as the district court here pointed out (J.S. App. 8a), the lobbying limitation serves the legitimate government purpose of assuring the Treasury's neutrality toward the lobbying activities of charitable organizations, of preventing abuses of charitable lobbying by private interests, and of preserving a balance between the lobbying activities of charitable organizations and those of other organizations and individuals. Cf. *United States* v. *Harriss*, 347 U.S. 612, 625-626 (1954). The limitation upon lobbying activities is neutral as to the points of view appellee would espouse. It therefore does not suffer the constitutional infirmity of the loyalty oath in *Speiser*. See *Taxation With Representation* v. *United States*, 585 F.2d 1219, 1223-1224 (4th Cir. 1978), cert. denied, 441 U.S. 905 (1979); *Haswell* v. *United States*, 500 F.2d 1133, 1142, 1150 (Ct. Cl. 1974), cert. denied, 419 U.S. 1107 (1975); *Kuper* v. *Commissioner*, 332 F.2d 562, 563 (3d Cir.), cert. denied, 379 U.S. 920 (1964). As Judge Learned Hand concluded with respect to a similar restriction against the deduction of lobbying expenses in a predecessor of Section 170(c)(2), "[p]olitical agitation as such is outside the statute, *however innocent the aim* * * *. Controversies of that sort must be conducted without public subvention; the Treasury stands aside from them." *Slee* v. *Commissioner*, 42 F.2d 184, 185 (2d Cir. 1929) (emphasis supplied).[13]

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[13] The other cases upon which the court of appeals relied do not cast doubt upon our submission that the tax statutes at issue here need only meet a rational basis standard. Those cases serve only to bear out that "[c]onstitutional concerns are greatest when the State attempts to impose its will by force of law" (*Maher* v. *Roe*, *supra*, 432 U.S. at 476). For example, in *First National Bank* v. *Bellotti*, 435 U.S. 765 (1978), this Court struck down a Massachusetts statute that made it a criminal act, punishable by fine and by imprisonment of the corporation's officers, for a bank or other business corporation to make an expenditure to influence the vote on any matter that did not affect materially the business of the corporation. *Id.* at 768-769 n.2. The Court found an infringement of the First Amendment, necessitating strict scrutiny, "where, as here, the legislature's *suppression of speech* suggests an attempt

In sum, the statutory classification in the revenue statutes challenged by appellee is not subject to the strict scrutiny of statutory distinctions that operate to deny a fundamental right to a particular class. Nor is it based (and appellee has never contended otherwise) on any "suspect criterion." Consequently, it is not subject to strict judicial scrutiny, as the court below erroneously held, but rather only must "be examined to determine whether it

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to give one side of a debatable public question an advantage" (435 U.S. at 784-786; emphasis added).

Similarly, in *Carey* v. *Brown*, 447 U.S. 455 (1980), the court considered an Illinois ordinance that made it unlawful, and punishable by fine and imprisonment, to picket a residence or dwelling, but excepted from that prohibition peaceful picketing of a place of employment involved in a labor dispute (*id.* at 457 & n.1). The Court observed that "under the guise of preserving residential privacy, Illinois has *flatly prohibited* all nonlabor picketing even though it permits labor picketing that is equally likely to intrude on the tranquility of the home." *Id.* at 462 (emphasis added). Accord, *Police Department* v. *Mosley*, 408 U.S. 92 (1972).

Thus, all of these cases involved an absolute prohibition imposed directly on protected activities. Here, by contrast, the revenue statutes appellee challenge do not prohibit it from engaging in lobbying activities. Those provisions simply grant appellee tax-exempt status on the condition that "no substantial part" of its activities be devoted to influencing legislation.

To the same effect are *Metromedia, Inc.* v. *City of San Diego*, 453 U.S. 490 (1981) (ordinance imposing prohibitions on the erection of outdoor advertising displays); *Schad* v. *Borough of Mount Ephraim*, 452 U.S. 61 (1981) (ordinance prohibiting live entertainment); *Central Hudson Gas & Electric Corp.* v. *Public Service Commission*, 447 U.S. 557 (1980) (regulation that prohibited utility from promoting use of electricty); *Consolidated Edison Co.* v. *Public Service Commission*, 447 U.S. 530 (1980) (regulation that prohibited utility from expressing views on "controversial issues of public policy"); *Village of Schaumburg* v. *Citizens for a Better Environment*, 444 U.S. 620 (1980) (ordinance prohibiting solicitation of charitable contributions); *Hynes* v. *Mayor of Oradell*, 425 U.S. 610 (1976) (ordinance regulating door-to-door canvassing and solicitation); *Healy* v. *James*, 408 U.S. 169 (1972) (denial by state college of official recognition for an SDS chapter); *NAACP* v. *Button*, 371 U.S. 415 (1963) (statute banning the solicitation of legal or professional business).

rationally furthers some legitimate, articulated state purpose and therefore does not constitute an invidious discrimination." *San Antonio Independent School District* v. *Rodriguez*, *supra*, 411 U.S. at 17; see *Maher* v. *Roe*, 432 U.S. 464, 470 (1977); *Harris* v. *McCrae*, 448 U.S. 297, 322 (1980); *Johnson* v. *Robison*, 415 U.S. 361, 375 n.14 (1974). We now show that the distinction drawn by Congress rationally furthers a legitimate legislative purpose.

B. Congress' Imposition Of Different Standards With Respect To The Lobbying Activities Of Veterans' Organizations And Other Categories Of Tax-Exempt Organizations Rationally Furthers The Legitimate Ends Of The Exempt Organizations Provisions

The classifications of Sections 501(c) and 170(c) are fully consistent with the requirements of equal protection because they "rest upon some ground of difference having a fair and substantial relation to the object of the legislation" (*Johnson* v. *Robison*, 415 U.S. 361, 374-375 (1974), quoting *F.S. Royster Guano Co.* v. *Commonwealth of Virginia*, 253 U.S. 412, 415 (1920)). This Court repeatedly has sustained classifications in remedial measures that do not abridge fundamental rights but rather address " 'the phase of the problem which seems most acute to the legislative mind.' " *Buckley* v. *Valeo*, 424 U.S. 1, 105 (1976), quoting *Williamson* v. *Lee Optical Co.*, 348 U.S. 483, 489 (1955); see *Katzenbach* v. *Morgan*, 384 U.S. 641, 657 (1966); *Jefferson* v. *Hackney*, 406 U.S. 535, 546 (1972). As its terms and history demonstrate, the lobbying limitation is precisely such a measure. It addresses what Congress regarded as a serious abuse of the exempt organization provisions—the lobbying activities of organizations within the class described by Section 501(c)(3). Furthermore, equal protection does not require that "things which are different in fact * * * be treated in law as though they were the same." *Tigner* v. *Texas*, 310 U.S. 141, 147 (1940). The debt which the nation owes to

veterans, who have endured the peril of war and the disruption of civil pursuits associated with service in the armed forces, provides ample justification for the favorable tax treatment granted to their organizations by Congress.

1. ***The lobbying limitation addresses a specific problem recognized by Congress***

a. In *Buckley* v. *Valeo*, *supra*, 424 U.S. at 105-108, this Court rejected an equal protection challenge to provisions of the Federal Election Campaign Act of 1971, 2 U.S.C. 431 *et seq.*, that grant public funding only for candidates who run in primary elections. As the Court stated (424 U.S. at 105, quoting *Katzenbach* v. *Morgan*, 384 U.S. 641, 567 (1966) (footnote omitted)):

> [I]n deciding the constitutional propriety of the limitations in such a reform measure we are guided by the familiar principles that a "statute is not invalid under the Constitution because it might have gone farther than it did," *Rochen* v. *Ward*, 279 U.S. 337, 339, that a legislature need not "strike at all evils at the same time," *Semler* v. *Dental Examiners*, 294 U.S. 608, 610, and that "reform may take one step at a time, addressing itself to the phase of the problem which seems most acute to the legislative mind," *Williamson* v. *Lee Optical Co.*, 348 U.S. 483, 489.

Applying that principle, the Court found that the distinctions drawn were "not an unreasonable way" to accomplish the underlying congressional objective of limiting the influence on primary elections of large private contributions and of discouraging frivolous candidacies. 424 U.S. at 106; see also *id.* at 96. Respect for the legislative judgment was fully applicable, the Court pointed out, to a claim of invidious discrimination "with First Amendment overtones" (*id.* at 105-106 n.143)—a claim such as appellee presses here.

The classification appellee challenges fits squarely within the doctrine reaffirmed by the Court in *Buckley*. The establishment of distinct categories of exempt organiza-

tions is a rational means of furthering the underlying congressional purpose of providing tax benefits to those organizations worthy of receiving them. See *Trinidad* v. *Sagrada Orden*, 263 U.S. 578, 581 (1924); *St. Louis Union Trust Co.* v. *United States*, 374 F.2d 427, 432 (8th Cir. 1967); H.R. Rep. No. 1860, 75th Cong., 3d Sess. 19 (1938). It derives also from the congressional policy, sharply defined in many contexts, against the use of large private contributions to distort the legislative process.[14]

A similar legislative motive underlies other statutes, including the Federal Regulation of Lobbying Act, ch. 753, 60 Stat. 839, 2 U.S.C. 261 *et seq.*, which requires that specified disclosures be made by any person who receives a contribution or expends money for the principal purpose of "influenc[ing] * * * the passage or defeat of any legislation by the Congress" (2 U.S.C. 264 and 266(b)). In *United States* v. *Harriss*, 347 U.S. 612 (1954), this Court characterized the purpose and spirit of the Lobbying Act as "to maintain the integrity of a basic governmental process" (*id.* at 625), and observed that to strike it down as violative of the First Amendment "would be to deny Congress in large measure the power of self-protection" (*id.* at 625-626). These expressions of a national policy reinforce the conclusion that "[a]ttempts to influence legislation are not the same as educational, charitable, religious, or scientific activities and they involve well-recognized dangers to representative Government procedures." *Haswell* v. *United States*, 500 F.2d 1133, 1150 (Ct. Cl. 1974), cert. denied, 419 U.S. 1107 (1975).

b. Contrary to the court of appeals' conclusions (J.S. App. 48a, 54a, 57a, 62a-67a), it is equally clear that

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[14] The history of the corresponding congressional policy to keep federal elections "free from the power of money" is recounted in *United States* v. *Automobile Workers*, 352 U.S. 567, 570-590 (1957). See also *Pipefitters Local No. 562* v. *United States*, 407 U.S. 385 (1972); *Burroughs & Cannon* v. *United States*, 290 U.S. 534 (1934); *Christian Echoes National Ministry, Inc.* v. *United States*, 470 F.2d 849, 857 (10th Cir. 1972), cert. denied, 414 U.S. 864 (1973).

Congress has recognized that it would be a greater threat to the goals of the exempt-organization statutes to grant organizations classified as charitable the authority to engage in substantial lobbying with tax-deductible contributions than to grant such authority to veterans' organizations. Congress enacted a lobbying limitation applicable in terms to charitable, educational, scientific, and religious groups, but not to veterans' organizations, and has maintained that distinction in effect for almost 50 years through repeated reenactments and amendments of the tax laws. This statutory system is not the result of inadvertence (see J.S. App. 78a-79a). On the contrary, the evolution of the relevant legislation leaves no doubt that the distinction drawn by Congress with respect to the treatment of veterans' groups and charitable organizations was intentional.[18]

As we pointed out (pages 15-16, *supra*), Section 501(c)(3), which grants tax exemption to organizations classified as charitable, derives from the Act of Aug. 27, 1894, ch. 349, Section 32, 28 Stat. 556. Its substance was carried into the first modern income tax statute, Act of Oct. 3, 1913, ch. 16, Section II(G)(a), 38 Stat. 172, which contained an exemption in favor of "any corporation or

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[18] This is not to imply, as the court of appeals did (J.S. App. 49a, 57a, 65a-66a & n.44), that the validity or character of the challenged classification turns on the legislative history. Rather, as the Court stated in *United States Railroad Retirement Board* v. *Fritz*, *supra*, 449 U.S. at 179:

> Where, as here, there are plausible reasons for Congress' action, our inquiry is at an end. It is, of course, "constitutionally irrelevenat whether this reasoning in fact underlay the legislative decision," *Flemming* v. *Nestor*, 363 U.S. at 612, because this Court has never insisted that a legislative body articulate its reasons for enacting a statute. This is particularly true where the legislature must necessarily engage in a process of line-drawing.

See also *United States* v. *Maryland Savings-Share Insurance Corp.*, *supra*; *Carmichael* v. *Southern Coal & Coke Co.*; *Western & Southern Life Insurance Co.* v. *State Board of Equalization*, *supra*.

association organized and operated exclusively for religious, charitable, scientific, or educational purposes * * *." Not until 1972 did Congress enact a separate category of exemption specifically to cover veterans' organizations. Veterans' organizations, however, were first accorded status as eligible donees of tax-deductible contributions in 1924 (see page 15, *supra*). Prior to 1972, veterans' groups qualified for exemption as social welfare organizations (Section 501(c)(4) of the 1954 Code), or as social clubs (Section 501(c)(7) of the 1954 Code). These provisions originated in Section II(G)(a) of the Revenue Act of 1913, and Section 11(a), Revenue Act of 1916, ch. 463, 39 Stat. 766.

The income tax deduction for charitable contributions, now found in Section 170(c)(2) of the Internal Revenue Code of 1954, has its origin in the War Revenue Act of 1917, ch. 63, Section 1201(2), 40 Stat. 330. See *Helvering* v. *Bliss*, 293 U.S. 144, 147 (1934). As carried into Section 214(a)(11) of the Revenue Act of 1918, ch. 18, 40 Stat. 1068, it provided deductions for gifts "to corporations organized and operated exclusively for religious, charitable, scientific, or educational purposes * * *." The deduction for income tax purposes for gifts to veterans' organizations (now Section 170(c)(3) of the 1954 Code) derives from Section 214(a)(11), Revenue Act of 1921, ch. 136, 42 Stat. 241, which added as an eligible donee of deductible contributions "posts of the American Legion or the women's auxiliary units thereof * * *." In the Revenue Act of 1924, this language was deleted and a separate category was created for gifts to "posts or organizations of war veterans, or auxiliary units or societies of any such posts or organizations" (Section 214(a)(10)(D), Revenue Act of 1924, ch. 234, 43 Stat. 271). Veterans' organizations have been continued as a separate category of eligible donees of deductible contributions ever since. See Internal Revenue Code of 1939, 26 U.S.C. (1940 ed.) 23(o)(2) and 23(q)(3).

At the time of these enactments, the revenue laws contained no expres limitations on lobbying by exempt organizations, and as we have pointed out (page 15, *supra*), no such limitations were imposed until the Revenue Act of 1934. As early as 1919, however, the Treasury promulgated Regulations providing that "associations formed to disseminate controversial or partisan propaganda are not educational within the meaning of the statute" which granted exemption to charitable, religious, and educational groups. Art. 517, Treas. Reg. § 45, promulgated by T.D. 2831, 21 Treas. Dec. Int. Rev. 285 (1919); cf. Treasury Regulations on Income Tax (1954 Code), 26 C.F.R. 1.501(c)(3)-1(d)(3). The courts repeatedly sustained that conclusion as to a range of partisan organizations claiming exemption as charitable, scientific or educational even before the enactment of the Revenue Act of 1934.[16] In the leading case, *Slee* v. *Commissioner*, 42

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[16] *Slee* v. *Commissioner*, 42 F.2d 184 (2d Cir. 1930) (American Birth Control League; *Fales* v. *Commissioner*, 9 B.T.A. 828 (1927) (Scientific Temperance Association); *Coxe* v. *Commissioner*, 5 B.T.A. 261 (1926) (League to Enforce Peace); *Forstall* v. *Commissioner*, 29 B.T.A. 428, 436 (1933) (League of Nations Association); *Watson* v. *Commissioner*, 27 B.T.A. 463, 468 (1932) (Citizens League of Cleveland).

During this period, Congress also turned its attention to the status and operations of groups engaged in lobbying. As early as 1913, the House conducted an investigation into the activity "for the purpose of improperly influencing legislation" of the National Association of Manufacturers, a nonprofit association, the National Council for Industrial Defense, and other groups. H.R. Rep. No. 113, 63d Cong., 2d Sess. (1913); 51 Cong. Rec. 565, 566-567 (1913). From 1928-1931, the Caraway Committee investigated activities designed to affect legislation, and its reports detailed the expenditures made and contributions solicited and received by various groups in attempts indirectly to influence legislation. See S. Rep. No. 43 (Pt. 4), 71st Cong., 1st Sess. 6-7 (1930) (American Taxpayers' League), Pt. 7 (Muscle Shoals lobby), Pt. 8 (Association Against the Prohibition Amendment). Senator Caraway cited as among the evils he hoped to correct "fake agricultural associations, fake scientific associations, fake religious associations, * * * fake associations in opposition to prohibition" (S. Rep. No. 342, 70th Cong., 1st Sess. 2, 3 (1928)).

F.2d 184, 185 (2d Cir. 1930), Judge Learned Hand addressed whether the American Birth Control League qualified as an eligible donee of deductible charitable contributions under a predecessor of Section 170(c)(2), as follows:

> It may indeed be for the best interests of any community voluntarily to control the procreation of children, but the question before us is whether the statute covers efforts to proselytize in that or other causes. Of the purposes it defines "educational" comes the closest, and when people organize to secure the more general acceptance of beliefs which they think beneficial to the community at large, it is common enough to say that the public must be "educated" to their views. In a sense that is indeed true, but it would be a perversion to stretch the meaning of the statute to such cases; they are indistinguishable from societies to promote or defeat prohibition, to adhere to the League of Nations, to increase the Navy, or any other of the many causes in which ardent persons engage.

As this Court observed in *Cammarano* v. *United States*, *supra*, 358 U.S. at 512, the subsequent addition to the charitable exemption and deduction statutes by the Revenue Act of 1934 "made explicit the conclusion derived by Judge Learned Hand in 1930" in *Slee*. The 1934 Act clearly addressed the abuse of the statutes which Congress perceived as most in need of correction. It originated in the Senate Finance Committee. According to the committee's chairman (78 Cong. Rec. 5959 (1934) (Sen. Harrison)):[17]

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[17] See 78 Cong. Rec. 5861 (1934) (Sen. Reed):

> There is no reason in the world why a contribution made to the National Economy League should be deductible as if it were a charitable contribution if it is a selfish one made to advance the personal interests of the giver of the money. That is what the committee was trying to reach, but we found great difficulty in phrasing the amendment.

> the attention of the Senate committee was called to the fact that there are certain organizations which are receiving contributions in order to influence legislation and carry on propaganda. The committee thought there ought to be an amendment which would stop that, so that is why we have put this amendment in the bill.

Although the chairman thereupon expressed his personal view—previously "called [to] the attention of the experts"— that the proviso as to lobbying should be inserted in another place in the bill so that it would apply to all organizations otherwise eligible to receive tax-deductible contributions, including "war organizations," the Congress, with his view before it, enacted, and has since maintained in continuous effect, a limitation applicable by its terms only to organizations classified as charitable, and not to veterans' organizations.[18] See Revenue Act of

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[18] 78 Cong. Rec. 5959 (1934) (Sen. Harrison). As reflected in the debate, the focus of the 1934 Act was on the provision (Section 23(o)(2)) that governed the deductibility for income tax purposes of contributions to organizations classified as charitable that engaged in influencing legislation. The concurrent exemption provision covering charitable organizations (Section 101(6)) was recommended by the Senate Finance Committee "in accordance with the change [in] section 23(o)" and the concurrent provisions governing the deductibility for estate and gift tax purposes of charitable contributions (Sections 406 and 517) were "necessary to carry out the policy adopted in section 23(o)(2)." S. Rep. No. 558, 73d Cong., 2d Sess. 30, 46, 52 (1934); see *id.* at 26.

There is no support for the court of appeals' suggestion that the exemption of veterans' groups from the lobbying limitation was due to "a drafting oversight" (J.S. App. 52a; see *id.* at 54a). The Revenue Act of 1934 recognized five discrete categories of organizations as eligible donees of contributions deductible for income tax purposes: the United States, any state, or any political subdivision thereof (Section 23(o)(1)); religious, charitable, scientific or educational organizations (Section 23(o)(2)); the special fund for vocational rehabilitation authorized by Section 12 of the World War Veterans Act of 1924, ch. 320, 43 Stat. 611 (Section 23(o)(3)); posts or organizations of war veterans, or auxiliary units or societies of any such posts or organizations (Sec-

1934, ch. 277, Sections 23(o)(2), 101(6), 406, and 517, 48 Stat. 690, 700, 755, 760. Internal Revenue Code of 1939, 26 U.S.C. (1940 ed.) 23(o)(2), (q)(2) and 101(6); Internal Revenue Code of 1954, 26 U.S.C. 170(c)(2) and 501(c)(3).

c. Since 1934, Congress has repeatedly reaffirmed the need for these limitations as a curb upon the flow of tax-exempt and tax-deductible funds to charitable organizations active in political and legislative matters. But it has never extended these restrictions to veterans' organizations.

In enacting the Tax Reform Act of 1969, Pub. L. No. 91-172, 83 Stat. 487 *et seq.*, a major overhaul of the provisions governing charitable organizations, Congress added to the Code Sections 507-509 and 4945 which impose

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tion 23(o)(4)); a fraternal society operating under the lodge system (Section 23(o)(5)). Of these provisions, the 1934 Act added the lobbying limitation only to Section 23(o)(2), relating to charitable organizations. The Senate amendment to Section 23(o)(2) would have prohibited any income tax deductions for contributions to charitable organizations, "a substantial part of the activities of which is participation in partisan politics or is carrying on propaganda, or otherwise attempting, to influence legislation." See S. Rep. No. 558, 73d Cong., 2d Sess. 26 (1934). But the House conferees were concerned that even that prohibition was "too broad" (78 Cong. Rec. 7831 (1934)). They accordingly succeeded in convincing the Senate conferees to strike the reference to "participation in partisan politics" (*ibid.*). Similar concessions were made in the amendments relating to the exemption for charitable organizations and to the allowance of deductions for gift and estate tax purposes for gifts to charitable organizations. *Ibid.* See H.R. Conf. Rep. No. 1385, 73d Cong., 2d Sess. 17, 19 (1934). (The phrase deleted was not restored to the statutes until the enactment of the Internal Revenue Code of 1954, Sections 170(c)(2) and 501(c)(3), which deny exemption or deductibility of contributions for charitable organizations which "participate in or intervene in (including the publishing or distributing of statements), any political campaign on behalf of any candidate for public office." See also 26 U.S.C. 2055(a)(2), 2522(a)(2) and (b)(2)). At all events, even on the assumption that a "drafting error" occurred in 1934, the plain fact is that Congress has never seen fit to correct it during its successive reviews of the tax exemption provisions.

on charitable organizations classified as private foundations an excise tax for their expenditures to influence legislation or to influence public elections. The accompanying committee reports detail legislative and political activities by these organizations that had come to the attention of Congress. H.R. Rep. No. 91-413 (Pt. 1), 91st Cong., 1st Sess. 32-33 (1969); S. Rep. No. 91-552, 91st Cong., 1st Sess. 47-48 (1969). As the reports explain, "[c]ongressional policy regarding carrying on this type of political activity with tax-exempt or tax-deductible funds appears to be clear in view of the language of present law" (*ibid.*). The subsequent addition to the Code of Sections 501(h) and 4911 (by Section 1307, Tax Reform Act of 1976, Pub. L. No. 94-455, 90 Stat. 1720-1729), the fruit of extensive deliberations spanning more than 5 years,[19] imposes an excise tax on certain expenditures for legislative activity by "public charities" which elect to be covered by those statutes, and establishes precise limits on the amount which an electing "public charity" may spend on legislative activity without incurring that excise tax or loss of its Section 501(c)(3) status and qualification for tax-deductible contributions.[20]

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[19] The dissent below cited several of the bills introduced during this period (J.S. App. 101a n.26). See also *Legislative Activity by Certain Types of Exempt Organizations: Hearings on H.R. 13720 Before the House Comm. on Ways and Means*, 92d Cong., 2d Sess. (1972); *General Tax Reform: Hearings Before the House Comm. on Ways and Means*, 93d Cong., 1st Sess. (1973); *Influencing Legislation by Public Charities: Hearings on H.R. 13500 Before the House Comm. on Ways and Means*, 94th Cong., 2d Sess. (1976); Geske, *Direct Lobbying Activities of Public Charities*, 26 Tax Law. 305, 310-319 (1973).

[20] Sections 501(h) and 4911 give a detailed meaning to the terms "substantial part," "activities," and "attempting * * * to influence legislation" that appear in Section 501(c)(3). A "public charity," which so elects, shall not lose its status under Sections 501(c)(3) and 170(c)(2) because a substantial part of its activities consists of attempts to influence legislation unless it normally spends for that purpose more than a specified percentage, determined on a sliding scale, of the total amount it spends to accomplish its exempt pur-

As the dissent below pointed out, this confirmation of the need for restrictions on legislative activity by charitable organizations, made in the face of opposition and after prolonged debate, "suggest[s] that doubts about the purpose of that section as adopted in 1934 are largely misconceived" (J.S. App. 103a n.29).

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pose. 26 U.S.C. 501(h) and 26 U.S.C. (& Supp. IV) 4911 (added by Section 1307, Tax Reform Act of 1976, Pub. L. No. 94-455, 90 Stat. 1720-1729); see S. Rep. No. 94-938 (Pt. 2), 94th Cong., 2d Sess. 79-80 (1976). This amendment specifies that an activity is not regarded as "influencing legislation" if it consists of nonpartisan analysis or research; advice or assistance in response to a request from a legislature; or appearances before or communications to a legislature concerning any matter that might affect the powers, duties, or tax status of the organization. 26 U.S.C. 4911(d); cf. 26 U.S.C. 4945(e); Treasury Regulations on Foundation and Similar Excise Tax (1954 Code), 26 C.F.R. 53.4945-2(d), applicable to private foundations; *Haswell* v. *United States*, *supra*, 500 F.2d at 1141-1145.

Were appellee otherwise qualified under Sections 501(c)(3) and 170(c)(2), it would have been entitled to make this election under Section 501(h) as an organization expecting to draw its support from the general public (J.A. 35). A predecessor organization of appellee, TWR Fund, whose operations appellee assumed, so qualified (J.A. 53). See 26 U.S.C. 501(h)(4)(D), and (E), 509(a)(2), 170(b)(1)(A)(vi). Thus, if appellee spent $200,000 per year to further its exempt purposes, as TWR Fund proposed to do in 1979 (J.A. 24), it could spend up to 30 percent of that amount to influence legislation through presentations before a legislature and still qualify for Section 501(c)(3) status and for eligibility to receive tax-deductible contributions. 26 U.S.C. 501(h)(1) and (2); 26 U.S.C. (& Supp. IV) 4911(c) and 26 U.S.C. 4911(d).

Contrary to the suggestion of the court below (J.S. App. 19a n.6) the fact that appellee did not elect Section 501(h) treatment (see J.A. 17-18) does not render the provisions irrelevant. Cf. *Alexander* v. *"Americans United" Inc.*, 416 U.S. 752, 762 n.13 (1974). Section 501(h) provides a mechanism by which appellee can assure that it may engage in a specified amount of lobbying without inviting a challenge to its Section 501(c)(3) exemption (J.S. App. 100a-106a; dissenting opinion). The statute therefore represents a considered accommodation, to the extent consistent with the aims of the exempt organization provisions, of the First Amendment values inherent in legislative advocacy. Cf. *United States* v. *Lee*, No. 80-767 (Feb. 23, 1982).

In the course of refining the lobbying limitation applicable to charitable organizations, Congress turned its attention specifically to the tax treatment of veterans' organizations, and continued in effect their longstanding exemption from the lobbying limitation imposed on charitable organizations. 26 U.S.C. 501(c)(19), added by Section 2, Act of Aug. 29, 1972, Pub. L. No. 92-418, 86 Stat. 656; see H.R. Rep. No. 92-851, 92d Cong., 2d Sess. 2-3 (1972); S. Rep. No. 92-1082, 92d Cong., 2d Sess. 1, 3, 4-5 (1972). Indeed, as recently as August 1982, Congress amended the membership requirement of Section 501(c)(19) without imposing a lobbying limitation on veterans' organizations. Section 354, Tax Equity & Fiscal Responsibility Act of 1982, Pub. L. No. 97-248, 96 Stat. 640.

Finally, apart from the tax benefits enjoyed by veterans' organizations over Section 501(c)(3) organizations with respect to lobbying, it is significant that veterans' organizations are subject to certain statutory restrictions that are not applicable to Section 501(c)(3) organizations. For example, while an individual may generally deduct contributions to Section 501(c)(3) organizations up to 50% of his adjusted gross income, he may deduct only 20% of his adjusted gross income for contributions to veterans' organizations. See Section 170(b)(1)(B). Second, the carryover of contributions in excess of the percentage limitations is applicable to Section 501(c)(3) organizations but not to gifts to veterans' organizations. Section 170(d). Third, contributions by private foundations to veterans' organizations are subject to the 10% excise tax on taxable expenditures unless the grantor receives assurance that the contribution will be used only for charitable purposes. See Section 4945(a), (d)(5); Treasury Regulations on Foundation and Similar Excise Tax, 26 C.F.R. 53.4945-6(c). Fourth, the estate tax deduction for gifts to veterans' organizations is limited to those organizations incorporated by Act of Congress. See Section 2055(a)(4). Cf. Section

170(c)(3) (income tax); Section 2522(a)(4) (gift tax). Moreover, nonresident decedents are permitted an estate tax deduction for gifts to Section 501(c)(3) organizations but not to veterans' organizations. See Section 2106(a)(2)(A). Cf. Section 2522(b) (gift tax). Finally, unlike Section 501(c)(3) organizations, veterans' organizations are not eligible for gifts of inventory or conservation property. See Sections 170(e)(3) and 170(h) (26 U.S.C. (& Supp. IV)).

Hence, it is plain that the Internal Revenue Code does not favor veterans' organizations over Section 501(c)(3) organizations in every respect across the board. Quite the contrary, the detailed tax exemption provisions reveal that Congress separately addressed each aspect of the activities of the categories of exempt organizations. For the court of appeals to single out the lobbying restriction upon Section 501(c)(3) organizations as violative of the equal protection guaranty destroys the balance of the statutory system established by Congress during the past 50 years.

d. Given the careful and virtually continuous legislative attention to the problems posed by the various categories of exempt organizations, it is "surely not * * * unreasonable" (*Buckley* v. *Valeo*, *supra*, 424 U.S. at 106) to assume that Congress regarded the lobbying activity of charitable organizations as more susceptible to abuse than the lobbying activity of veterans' groups. The Internal Revenue Service advises that as of the close of 1981, approximately 300,000 organizations were recognized as exempt under Section 501(c)(3), but only approximately 35,000 veterans' groups were listed as exempt under Section 501(c)(4) and (19). As the court of appeals pointed out (J.S. App. 73a), contributions to Section 501(c)(3) organizations aggregated more than $21.9 billion in 1978, nearly 1500 times the $16.7 million given to veterans' organizations. These statistics reinforce the court's own conclusion that "if we permitted Section 501(c)(3) groups to lobby as freely as veterans' organizations, there would be a clear risk of abuse by private

interests and an increase in the amount of 'selfish' contributions 'made to advance the personal interests of the giver of the money'" (J.S. App. 73a-74a, quoting 78 Cong. Rec. 5861 (1934) (Sen. Reed)).

What is more, Congress has not in fact given veterans' organizations carte blanche authority to lobby. As the dissent below pointed out (J.S. App. 116a-117a), the federal statutes that charter the AMVETS and the Blind Veterans of World War I, among other prominent veterans' groups, bar them from engaging in partisan activity and otherwise limit their legislative and political involvements.[21] Only last year, Congress granted charters to two veterans' organizations subject to the restriction that they 'shall not contribute to, support or otherwise participate in any political activity or in any manner attempt to influence legislation." Act of Nov. 20, 1981, Pub. L. No. 97-82, Section 8(c), 95 Stat. 1092, to be codified at 36 U.S.C. 1708(c) (Italian American War Veterans of the United States); Act of Nov. 20, 1981, Pub. L. No. 97-83, Section 8(c), 95 Stat. 1095, to be codified at 36 U.S.C. 1808(c) (United States Submarine Veterans of World War II).[22]

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[21] See 36 U.S.C. 67d ("No part of the activities of [American Veterans of World War II] shall consist of carrying on propaganda" and "[t]he corporation * * * shall not contribute to or otherwise support or assist any political party or candidate for elective public office"); Section 86 ("The [Blind Veterans of World War I] shall be nonpolitical and shall not be used for the dissemination of partisan principles"). See also 36 U.S.C. 46 (American Legion); Section 90a (Disabled American Veterans); Section 1156 (Paralyzed Veterans of America).

[22] Congress is well equipped to police these restrictions and to ascertain the extent of any political or legislative activity by veterans' organizations under federal charter. The receipts and expenditures of all private corporations established by federal law must be audited annually by an independent accountant and a report thereof submitted to the Congress. 36 U.S.C. 1102. Among the veterans' organizations subject to this requirement are The American Legion, AMVETS, Disabled American Veterans, Jewish War

Nor was the court of appeals correct in assuming that the Internal Revenue Code provides "open-ended subsidization of any position that these groups choose to espouse" (J.S. App. 72a; see *id.* at 23a). The Treasury Regulations under Section 501(c)(19) make explicit that a veterans' organization does not qualify for tax-exempt status under that section unless it is operated "exclusively" for one or more enumerated exempt purposes. Treasury Regulations on Income Tax (1954 Code), 26 C.F.R. 1.501(c)(19)-1(c). Among these are to promote the social welfare by bringing about civic betterments and social improvements (cf. Section 501(c)(4) and Treasury Regulations on Income Tax (1954 Code), 26 C.F.R. 1.501(c)(4)-1(a)(2)); to assist disabled and needy war veterans and their dependents; to carry on programs to perpetuate the memory of deceased veterans; to conduct programs for charitable purposes (cf. Section 501(c)(3)); or to provide social and recreational activities for their members (cf. Section 501(c)(1)).[23] Thus, a veterans' group that engages in ac-

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Veterans, United States Blind Veterans of World War I, Veterans of Foreign Wars of the United States, Veterans of World War I of the United States, Italian American War Veterans of the United States, United States Submarine Veterans of World War II, and the Paralyzed Veterans of America. 36 U.S.C. 1101 and 1166. Many of these organizations are also required annually to file with Congress reports of their proceedings. E.g., 36 U.S.C. 49 (The American Legion); Section 90i (Disabled American Veterans); Section 118 (Veterans of Foreign Wars of the United States).

[23] The requirement that it be operated exclusively for one or more among enumerated purposes applies also to a veterans' organization that claims exemption as a social welfare organization or as a social club. See 26 U.S.C. 501(c)(4) and (7); Treasury Regulations on Income Tax (1954 Code), 26 C.F.R. 1.501(c)(7)-1. Veterans' organizations established under federal law are subject to analogous restrictions as a condition to maintaining their charters. See e.g., 36 U.S.C. 43 (The American Legion); Section 113 (Veterans of Foreign Wars); Section 90c (Disabled American Veterans). The recently chartered Italian American War Veterans of the United States and the United States Submarine Veterans of World War II must maintain tax-exempt status or forfeit their charters. Pub. L. No. 97-82, Section 15, 95 Stat. 1093, to be codified

tivity, including lobbying activity, that forms more than an insubstantial part of its overall activity and that is unrelated to its exempt purpose is subject to denial of exempt status and to disqualification for tax-deductible contributions. Cf. note 10, *supra*.

By these and other means Congress has ensured that the lobbying activity of veterans' organizations is directed toward the purpose for which they were chartered. These limitations buttress Congress' determination that an extension to veterans' organizations of the lobbying restriction applied by the Internal Revenue Code to Section 501 (c) (3) organizations is not necessary to redress or prevent abuses by veterans' organizations of their status. Cf. *California Medical Association* v. *FEC*, 453 U.S. 182, 200 (1981); *Marker* v. *Shultz*, 485 F.2d 1002, 1007 (D.C. Cir. 1973).[24]

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at 36 U.S.C. 1714; Pub. L. No. 97-83, Section 15, 95 Stat. 1096, to be codified at 36 U.S.C. 1814.

Moreover, Section 170(f)(6) of the Code denies a charitable contribution deduction for out-of-pocket lobbying expenditure made on behalf of Section 501(c)(3) organizations *and* Section 501(c)(19) veterans' organizations.

[24] The court of appeals' suggestion that veterans' organizations exceed these limitations, to the disadvantage of appellee, is entirely speculative (see J.S. App. 23a-24a & n.11, 72a n.49). Nor has it relevance to this proceeding which was instituted under Section 7428 of the Code. No judgment may be rendered under that statute unless the petitioning organization first has exhausted its administrative remedies within the Internal Revenue Service. 26 U.S.C. 7428(b)(2). The decisions interpreting that requirement uniformly hold that in cases as here, involving the initial qualification of an organization, the facts must be confined to those contained in the administrative record already developed before the Commissioner at the time of his adverse ruling. *Houston Lawyer Referral Service, Inc.* v. *Commissioner*, 69 T.C. 570 (1978); *Est of Hawaii* v. *Commissioner*, 71 T.C. 1067, 1076-1078 (1979), aff'd, 647 F.2d 170 (9th Cir. 1981); *Animal Protection Institute, Inc.* v. *United States*, 42 A.F.T.R.2d (P-H) ¶ 78-5234 (Ct. Cl. 1978); *Virginia Professional Standards Review Foundation* v. *Blumenthal*, 466 F. Supp. 1164, 1167-1168 (D.C. 1979); *Southwest Virginia*

2. *The unique status of veterans' organizations amply justifies the less restrictive lobbying limitations granted them by Congress*

At all events, any disparity in Congress' treatment of lobbying activities by veterans' organizations and other categories of tax-exempt organizations rests upon grounds that are more than sufficient to meet the demands of equal protection. As the Fourth Circuit correctly concluded in *Taxation With Representation* v. *United States*, 585 F.2d 1219, 1224 (1978), cert. denied, 441 U.S. 905 (1979), in rejecting an identical equal protection claim by an organizational predecessor of appellee, "the unique and compelling societal and governmental goals served by * * * [veterans'] organizations provide ample justification for the special tax treatment extended to them by the Congress." See also J.S. App. 115a-116a (dissenting opinion); 38 U.S.C. 3402 (providing for recognition of veterans' organizations as the representatives of veterans in the prosecution of claims before the Veterans' Administration). In order to be eligible to receive tax-deductible contributions, a veterans' organization must be composed principally of war veterans.[25] 26 U.S.C. 170(c)(3). To

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Professional Standards Review Organization, Inc. v. *United States*, 42 A.F.T.R.2d (P-H) ¶ 78-5315 (D.C. Cir. 1978); see Rule 217, Tax Ct. R. (rev. 1977). These decisions are in accord with the legislative history of the statute. H.R. Rep. No. 94-658, 94th Cong., 1st Sess. 282, 286 & n.7 (1975); S. Rep. No. 94-938 (Pt. 2), 94th Cong., 2d Sess. 585, 588 & n.7 (1976).

[25] See Rev. Rul. 55-156, 1955-1 Cum. Bull. 292 (no income tax deduction under Section 23(o)(4) of the Code of 1939 for gift to reserve officers' association not composed "essentially" of war veterans). The recent amendment to Section 501(c)(19) of the 1954 Code (by Section 354, Tax Equity & Fiscal Responsibility Act of 1982, Pub. L. No. 97-248, 96 Stat. 640), which enables an organization composed principally of veterans to qualify for exemption thereunder (whether or not composed principally of war veterans) does not appear to relax the requirements for qualification as an eligible donee under Section 170(c)(3). As indicated above, Section 170(c)(3) and its statutory predecessors long antedate Section

these individuals of war the nation owes special gratitude for enduring the peril, and disruption of civil pursuits associated with wartime service in the armed forces. Indeed, "it is apparent to anyone who has lived through periods of war that contrived explanations are not necessary." *August* v. *Bronstein*, 369 F. Supp. 190, 193 (S.D.N.Y.), summarily aff'd, 417 U.S. 901 (1974).

Both Congress and state legislatures have recognized that debt by establishing veterans' preferences and other statutory benefits "to protect those who have been obliged to drop their own affairs to take up the burdens of the nation." *Boone* v. *Lightner*, 319 U.S. 561, 575 (1943). Accord, *Le Maistre* v. *Leffers*, 333 U.S. 1, 6 (1948). The legislative authority to provide such special benefits for veterans has been sustained repeatedly against constitutional attack.[26] Thus, in *Johnson* v. *Robison*, 415 U.S. 361, 374-386 (1974), the Court rejected an equal protection challenge to provisions of the Veterans' Readjustment Benefits Act of 1966 (38 U.S.C. 101) that limit the educational benefits provided thereunder to veterans who served on active duty. The Court underscored that "it is * * * [youths called to extended tours of military service]

501(c)(19), which was enacted specifically to provide that income a veterans' organization receives from insuring its members is not subject to the unrelated business income tax to the extent set aside for insurance benefits or for charitable purposes. See 26 U.S.C. 512(a)(4); H.R. Rep. No. 92-851, 92d Cong., 2d Sess. (1972); S. Rep. No. 92-1082, 92d Cong., 2d Sess. (1972).

[26] See *Personnel Administrator* v. *Feeney*, 442 U.S. 256 (1979); *Johnson* v. *Robison*, 415 U.S. 361, 374-386 (1974); *Russell* v. *Hodges*, 470 F.2d 212 (2d Cir. 1972); *Rios* v. *Dillman*, 499 F.2d 329 (5th Cir. 1974); *Frederick* v. *United States*, 507 F.2d 1264 (Ct. Cl. 1974); *Bannerman* v. *Department of Youth Authority*, 436 F. Supp. 1273 (N.D. Cal. 1977); *Branch* v. *Du Bois*, 418 F. Supp. 1128 (N.D. Ill. 1976); *Feinerman* v. *Jones*, 356 F. Supp. 252 (M.D. Pa. 1973) (three-judge court); *Koelfgen* v. *Jackson*, 355 F. Supp. 243 (D. Minn. 1972) (three-judge court), aff'd mem., 410 U.S. 976 (1973); cf. *Mitchell* v. *Cohen*, 333 U.S. 411 (1948). See also *United States* v. *Oregon*, 366 U.S. 643, 648-649 (1961).

who must serve in the Armed Forces throughout troubled parts of the world, thereby subjecting themselves to the mental and physical hazards as well as the economic and family detriments which are peculiar to military service and which do not exist in normal civil life." 415 U.S. at 380 (emphasis omitted), quoting S. Rep. No. 269, 89th Cong., 1st Sess. 6-7, 8 (1965). It concluded that this peculiar hardship formed a rational basis for denying the same benefits to a conscientious objector who had completed two years of alternate civilian service. 415 U.S. at 363-364, 381-383. See also *Mitchell* v. *Cohen*, 333 U.S. 411, 417-422 (1948); *Hilton* v. *Sullivan*, 334 U.S. 323 (1948); *Personnel Administrator* v. *Feeney*, 442 U.S. 256, 274-275, 279 n.25 (1979) ("the impact [of the veterans' preference] is essentially an unavoidable consequence of a legislative policy that has in itself always been deemed to be legitimate").[27]

Appellee has no stronger claim to be placed on the same tax footing as veterans' organizations than did the conscientious objector in *Robison* to achieve the same educational benefits as war veterans. The tax benefits granted veterans' organizations under the Internal Revenue Code are analogous to the other veterans' benefits that time and again have been upheld.[28] In the exercise of its broad

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[27] Given the strong national policy favoring veterans, we submit that the statutes in question could be upheld even under a heightened standard of judicial scrutiny.

[28] Indeed, the income tax deduction provision now found in Section 170(c) of the Code was enacted as a wartime measure to encourage charitable giving. War Revenue Act of 1917, ch. 63, Section 1201(2), 40 Stat. 330. As its sponsor observed, "I believe that the Senate will see the necessity for voting that exemption in war times." 55 Cong. Rec. 6728 (1917) (Sen. Hollis). The following year, there was added to the list of eligible donees "the special fund for vocational rehabilitation authorized by section 7 of the Vocational Rehabilitation Act [40 Stat. 617]" (Section 214(a)(11), Revenue Act of 1918, ch. 18, 40 Stat. 1068). The Act provided for vocational rehabilitation and for return to civil employment of dis-

power to "singl[e] out * * * one particular class for taxation or exemption" (*Carmichael* v. *Southern Coal & Coke Co.*, 301 U.S. 495, 509 (1937)), Congress has similar authority to protect the interests of veterans by allowing their organizations to use tax-deductible contributions to lobby on matters of importance to veterans without allowing other types of organizations to lobby to the same extent with tax-deductible funds.

Finally, it bears emphasis that the provisions at issue here are but a few among many in the complex and highly articulated exempt organization provisions of the Internal Revenue Code. An examination of the 22 categories of organizations granted exemption by Section 501(c), and the five categories of organizations recognized as donees of tax-deductible contributions under Section 170(c), discloses the range of discrete interests Congress has chosen to favor with these tax benefits (J.S. App. 123a-141a).

The decision below invites disruption of this statutory system not only with respect to Section 501(c)(3) organizations or to veterans' organizations. It could be argued with equal logic that a government agency or a cemetery company enjoys a tax preference over Section 501(c)(3) organizations such as appellee because, as in the case of a veterans' organization, it may lobby a substantial amount in furtherance of its exempt purpose and still retain

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abled veterans discharged from the Armed Forces. The special fund created by that Act, and by its successor enactment, the World War Veterans' Act of 1924, ch. 320, 43 Stat. 607 *et seq.*, was carried forward for more than 30 years as a separate category of donee eligible for tax-deductible contributions. See Section 23(o)(3), Internal Revenue Code of 1939 (26 U.S.C. (1940 ed.)). Thus, when Senator Lodge introduced the 1921 Amendment that made the American Legion an eligible donee of deductible contributions, he described the amendment with accuracy as one "to which I think there can be no possible objection." 61 Cong. Rec. 7066 (1921). Cf. Internal Revenue Code of 1954, 26 U.S.C. 112, 113, 217(g), 692, 1034(h), 2201 and 3401(a)(1), relating to tax benefits accorded to members of the Armed Forces.

eligibility to receive tax exemption and tax-deductible contributions. 26 U.S.C. 170(c)(1) and (5), 501(c)(13). The same could be said of other exempt organizations, including labor unions and business leagues granted exemption, respectively, by Section 501(c)(5) and (6). See *Associated Industries* v. *Commissioner*, 7 T.C. 1449, 1466 n.2 (1946), acq., 1947-1 Cum. Bull. 1; *Marker* v. *Shultz*, 485 F.2d 1003, 1007 (D.C. Cir. 1973); Rev. Rul. 61-177, 1961-2 Cum. Bull. 117 (business league qualifies for exemption where its sole or principal activity consists of advocating legislation beneficial to its common business interest); see generally *National Muffler Dealers Association* v. *United States*, 440 U.S. 472 (1979). Contributions to such organizations, which usually take the form of dues, may be deductible in whole or in part as business expenses even though the donee engages in substantial legislative activity. See Section 162(e); Treasury Regulations on Income Tax (1954 Code), 26 C.F.R. 1.162-20 (c)(3).

Each of these provisions reflects, as did the statutes involved in *California Medical Association* v. *FEC*, 453 U.S. 182, 201 (1981), "a judgment by Congress that these entities have differing structures and purposes, and that they therefore may require different forms of regulation * * *." In particular, organizations composed of veterans differ fundamentally in their status from appellee, which has been organized for the primary purpose of persuading Congress to its views on matters of taxation. The equal protection guaranty does not demand that these distinct categories of tax-exempt organizations be accorded identical treatment.

CONCLUSION

The judgment of the court of appeals should be reversed.

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